BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SANDRA K. ADAMS	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,016,082
	)	
BALL'S FOOD STORES/FOUR B CORP.	)	
Self-Insured Respondent	)	

ORDER

Claimant requested review of the December 21, 2006 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on March 28, 2007.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for the claimant. Timothy G. Lutz of Overland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found the claimant sustained a 47 percent functional impairment limited to $50,000.

The claimant requests review of the following: (1) nature and extent of disability; (2) compensation payable including temporary total disability compensation; (3) respondent's entitlement to a credit; and, (4) whether or not the claimant is entitled to future medical. Claimant argues she is permanently and totally disabled from engaging in any type of substantial gainful employment. In the alternative, the claimant argues she is entitled to a 49 percent work disability as well as future medical treatment and that the K.S.A. 44-510a credit does not apply.

Respondent argues the claimant did not sustain a new injury and therefore the ongoing symptoms are a natural and probable consequence of the original injury.

Respondent further argues the claimant is entitled to a 15 percent functional impairment based upon the opinions of Drs. Terrance Pratt, Joseph F. Galate and Patrick L. Hughes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent as a meat technician, which required her to repetitively use her hands to wrap meat and place trays of meat on racks. She had previously suffered work-related bilateral carpal tunnel syndrome. She had carpal tunnel release surgeries on both her right and left wrists in 2001 performed by Dr. J. Douglas Cusick. A workers compensation claim relating to her wrists was settled on March 13, 2003. Claimant testified that she was told she had to settle the case by the workers compensation office in Topeka. The settlement was a strict compromise of all issues, including future medical.

After the surgeries on her wrists, claimant returned to work for respondent doing her regular work duties. She testified she was released from treatment with no restrictions. Claimant testified that she thinks she would have had a good result after her carpal tunnel surgeries if she had not continued doing the same work. She said that her hands and wrists never stopped being a problem. Claimant saw Dr. Cusick in October 2002 because of ongoing problems with her upper extremities and was told that her problems were being caused by scar tissue.

Here, claimant is claiming a series starting November 2002 through July 10, 2003, claiming injuries to her bilateral hands, arms, shoulders, neck and all related systems caused by repetitive use of her hands.[1] She began having problems with her neck and shoulders but could not say when those problems started. However, she stated those problems had not started before November 2002. She believes the problems she is having now is from repetitively lifting the packages of meat, which could weigh from a few pounds to 30 pounds. She said she at times had lifted trays that contained five or six packages of meat.

In July 2003, claimant's neck pain worsened. Sometime in July 2003, claimant was moved out of the meat department, and she started working in pricing. She described that job as hanging and changing tags and changing ads. As part of the job, she was required to use a scanning gun. Some of that work required her to work above shoulder height but

[1] Form K-WC E-1 (filed March 26, 2004).

she was told to only change the tags on the lower shelves and that someone else would do the upper shelves. Claimant was also moved to customer service, but she complained that the counters were too high.

On December 5, 2003, claimant met with Jerry Lutjen, respondent's Director of Loss Prevention and Safety, and Linda McBroom from respondent's human resource department, concerning a permanent accommodated schedule so that she could continue to work full time at a comparable wage. Mr. Lutjen and Ms. McBroom set out a proposed work schedule that would accommodate her restrictions. Claimant agreed that the job outline given her was within the restrictions placed on her by the doctors. At the time, however, she believed that the weight restriction she had been given of 15 pounds was too heavy, and she requested a functional capacity evaluation (FCE).

The FCE was done on January 5, 2004. Claimant stated that there were parts of the FCE that she knew would be impossible for her and would cause her pain, and she chose not to do those parts. She testified that three/fourths through the FCE, she passed out. Once she was revived, she was sent home.

Claimant continued to work until February 4, 2004. On that date, she was taken off work by her personal physician, Dr. Mark Strehlow, who sent her to see a neurosurgeon, Dr. Frank Holladay. Dr. Holladay diagnosed her with a cervical strain and said she was not a candidate for surgery. Claimant did not ask Dr. Holladay if she should remain off work. Claimant testified that Dr. Strehlow took her off work until her pain was better, and the pain did not get better. Claimant has not returned to work since February 4, 2004. She is now on Social Security disability.

Mr. Lutjen testified that his capacity as Director of Loss Prevention and Safety, he oversees any claim involving workers compensation or safety. On November 20, 2003, claimant received permanent restrictions from Dr. Joseph Galate that included no lifting in excess of 15 pounds and no overhead activity. As a result, he and Linda McBroom met with claimant on December 5, 2003. The purpose of the meeting was to discuss her restrictions and accommodated work to keep her working full time. Accommodation had been provided from August 2003 through December 5, 2003. Claimant had worked in pricing, which required her to take product update labels off the computer and then go to the shelves and replace the old tag with the new one. She would use a verification gun to verify the tag before she would print the labels. Respondent also tried to place her in customer service, but claimant felt the counters were too high. As far as Mr. Lutjen knew, the jobs in customer service and in pricing were within the restrictions of Dr. Galate. The jobs are also within Dr. Cusick's restriction of not doing repetitive activities with her hands and upper extremities.

In the December 2003 meeting, he mentioned that he thought demonstrating product (demoing) would be best for claimant. Demoing would require her to hand out product samples. Sometimes it means putting the product on a tray and letting customers take the product or handing out coupons. He believed the job would be within claimant's restrictions. A proposed schedule was presented to claimant that included pricing, stocking shelves, and demoing. Claimant was to try the schedule for a couple of months and then her situation would be reviewed.

Claimant continued to work until February 4, 2004, when she went to her personal physician, who took her off work until she saw a neurosurgeon. No one at respondent told claimant that she could not longer work at her accommodated position. Claimant has not contacted respondent since February 4, 2004, about returning to her accommodated position. But for the fact that claimant discontinued her job on February 4, 2004, respondent would have continued to accommodate her restrictions. That accommodated job would have continued to pay her the same salary than she was receiving on the date of her injury. Mr. Lutjen agreed that claimant talked with the store manager and told him she was having problems doing the accommodated jobs and that the store manager told her those were the easiest jobs at the store.

Dr. Galate is board certified in physical medicine and rehabilitation as well as pain management. He focuses on treatment of the spine. Claimant was referred to him by respondent and first saw him on July 10, 2003. At that time she had good range of motion on her neck, shoulders, elbows, wrists, and hands. Dr. Galate suspected claimant was overusing her left arm and having referred pain with overcompensation of the bigger muscles in her proximal arm, neck and shoulder. He referred her to a certified hand therapist and gave her work restrictions of no lifting over 15 pounds and no repetitive use of her left hand. Claimant returned to Dr. Galate for a follow-up on July 31, 2003, complaining of continuing pain in her left arm and shoulder. An EMG showed no evidence of radiculopathy. She had spasm of the upper trapezius and levator scapula and scapula retractors, left side greater than the right.

Dr. Galate saw claimant again on August 28, 2003. She continued to complain of pain in her neck radiating down into her left arm and hand. Dr. Galate recommended physical therapy for her neck and shoulder and ordered an MRI of the cervical spine. Claimant again returned for follow-up on October 10, 2003. The MRI showed mild spondylitic changes with no evidence of central stenosis, foraminal narrowing, or thecal sac attenuation at any level. No evidence was suggested of cord pathology. There was a congenital partial anterior fusion of C6-T1.

On November 7, 2003, claimant followed up with Dr. Galate, still complaining of pain across her neck and shoulder. Claimant reported no significant change with anything done so far. Dr. Galate believed she had reached maximum medical improvement (MMI) from

a conservative standpoint and had no further recommendations for her except to aggressively work on maintaining proper posture, muscle balance, exercise and stretching.

Dr. Galate opined that demoing products would be within claimant's restrictions. He said claimant could do the pricing job as long as she was not changing tags over shoulder height. Stocking shelves in general merchandising would be within her restrictions as long as she lifted no more than 15 pounds and had no overhead activities. Dr. Galate testified that based on the restrictions he gave claimant, respondent attempted, within reason, to accommodate claimant. He believes claimant has chronic pain but believes she is still capable of returning to accommodated work within his restrictions.

Dr. Galate issued a report on November 20, 2003, at which time he gave claimant permanent restrictions of no lifting over 15 pounds and no overhead activities. He noted claimant had an 8 percent whole body disability relating to her previous carpal tunnel injuries. Dr. Galate stated he felt claimant's problems was overuse syndrome and said she could no longer tolerate the type of work she was doing. Using the AMA *Guides*[2], Dr. Galate found that claimant had a DRE Category II, 5 percent permanent partial impairment of the whole person.

Dr. Galate reassessed claimant on September 29, 2005. At that time she reported continuing cervical pain as well as left shoulder and upper arm pain. She assessed her pain as a 5 out of 10. Dr. Galate found mild tenderness over the trapezius. She lacked about 10 degrees of extension and lateral twisting of her cervical spine. She had break-away weakness in all major muscle groups tested. Since claimant had not worked since February 2004, Dr. Galate said he would not have expected that condition when it had not been present previously. Dr. Galate believed that claimant had chronic myofascial pain. He found no change in the amount of claimant's permanent partial impairment and did not change any of his previous work restrictions.

Dr. Galate reviewed the task list of Brenda Umholtz and of the 30 tasks on that list, he opined that claimant was unable to perform 11 for a 37 percent task loss. He also reviewed the task list prepared by Michael Dreiling and opined that of the 13 tasks on that list, claimant was unable to perform 7 for a 54 percent task loss.

Dr. Sergio Delgado, a board certified orthopedic surgeon, examined claimant on June 30, 2004, at the request of her attorney. He took a history from claimant and reviewed past medical records. The doctor performed a physical examination and found claimant had problems with her cervical spine, shoulder area as well as the bilateral upper

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

extremities. He diagnosed her with recurrent and persistent carpal tunnel syndromes bilaterally. She complained of cervical myofascial pain for which he did not find any objective clinical findings. Claimant had evidence of ulnar nerve entrapment of the left wrist. She had proximal upper extremity complaints which he could not relate to any objective findings. He diagnosed her with possible stress syndrome from repetitive work activities. That diagnosis covered her carpal tunnel and the ulnar nerve entrapment. In view of no additional causative factors, it was Dr. Delgado's opinion that claimant's complaints were related to the repetitive work she performed at respondent. He recommended work restrictions of no repetitive use of both upper extremities, no heavy lifting to exceed 15 pounds repetitively, 25 pounds occasionally, and no overhead work.

Dr. Delgado again saw claimant on March 30, 2006. He had claimant fill out a new discomfort assessment and found no significant difference between that one and the one she had filled out in 2004. The doctor again performed a physical examination of claimant. He found some cervical spasm and guarding which had not been present at the time of his original evaluation. Spasm and guarding are objective findings in relation to her complaints of cervical pain. Dr. Delgado diagnosed claimant with residuals of nerve entrapments involving both upper extremities and cervical myofascial findings.

Dr. Delgado did not know the condition of claimant's hands before his examination of June 30, 2004, and testified claimant indicated she did not have symptoms before November 2002. He is aware that she had bilateral carpal tunnel release in 2000 or 2001. He acknowledged that Dr. Cusick's medical records of October 2002 indicated claimant may have scar tissue of the left median nerve at the level of the wrist and hand that was significant enough to warrant additional surgical intervention.

Based on the AMA *Guides*, Dr. Delgado rated claimant as having a 16 percent whole person impairment for upper extremity pathology and a 5 percent whole person impairment for cervical pathology, for a 20 percent whole person permanent partial impairment. He did not attempt to apportion any of claimant's impairment of her upper extremities to any preexisting cause.

Dr. Delgado recommended permanent restrictions of avoiding neck movement and overhead lifting and limiting lifting to 15 pounds repetitively and 25 pounds occasionally using both upper extremities, preferably with braces being used. Claimant should work in a warm environment and avoid repetitive use of vibratory tools, and avoid repetitive gripping and pinching. Dr. Delgado reviewed the task list prepared by Mr. Dreiling and of the 13 tasks on the list, opined that claimant was unable to perform 7 for a task loss of 54 percent.

Dr. Terrence Pratt, who is board certified in physical medicine and rehabilitation, evaluated claimant on May 8, 2006, at the request of respondent. In taking a history,

claimant reported weakness and numbness in her right hand and left hands and had surgery on each in 2001. She returned to work without restrictions as a meat wrapper. From 2002 forward she noticed cervical discomfort. She complained of cervical fatigue with weakness radiating to the upper arms and shoulder blades. She also reported hand symptoms that go from the hands to the posterior arm and shoulder blades with aching and burning. She had weakness of the hands, numbness of the medial hand on the right and little finger on the left. She had a hard time holding up the cervical region when fatigued. She reported exacerbation of her symptoms with stress and severe discomfort when doing nothing. She reported anxiety attacks.

Upon examination, Dr. Pratt found that claimant's mood and affect were flat. She had tenderness on palpation diffusely extending anteriorly into the sternocleidomastoids, and temporomandibular joints and the parascapular areas with a positive jump sign. She had no true trigger points, no winging of the scapula, and was slow with limited active movements of the cervical region. She had limitations with active movements of the shoulders and wrists and some giveaway weakness on motor examination. She had generalized decreased sensory exam of the left hand and limitations two point discrimination limited to the left index finger.

Dr. Pratt was given Dr. Cusick's January 28, 2002 report rating claimant using the 5th edition of the AMA *Guides*. Using the 4th edition of the AMA *Guides*, Dr. Pratt testified that claimant's previous rating would have been 15 percent for her left upper extremity and 10 percent for her right upper extremity.

Dr. Pratt reviewed the results of claimant's cervical MRI and noted that there was some mild degenerative spondylosis but no evidence of compression or nerve root impingement. He opined that claimant had mild spondylosis, or arthritis, that preexisted her pending workers compensation claim. He said Dr. Holladay diagnosed claimant with a cervical strain, which is a soft-tissue injury. Dr. Pratt also noted that the FCE revealed that claimant was able to perform in a light physical demand level.

Dr. Pratt diagnosed claimant with a history of bilateral carpal tunnel syndrome with release procedures, a history of left ulnar entrapment at the wrist with a release procedure; cervicothoracic syndrome with prior diagnosis of myofascial pain, cervical spondylosis unrelated to her work activity, sleep disturbance, and anxiety/depression. Dr. Pratt testified that the only injury claimant sustained as a result of her work activities between November 2002 and July 2003 was the development of involvement in her cervical thoracic region. He did not believe that claimant's work activities aggravated or caused her bilateral upper extremity conditions to worsen because she reported continued symptoms after her surgeries and Dr. Cusick had recommended additional surgery in October 2002.

Dr. Pratt rated claimant as having a 5 percent permanent partial impairment to the body as a whole for her cervical strain based on DRE Category II of the AMA *Guides*. He recommended permanent restrictions of maximum lifting 15 to 20 pounds with the exception of overhead lifting, which is limited to 10 pounds; no frequent overhead activities; and no awkward positions of the cervical region. The restrictions were based only as a result of claimant's cervical condition.

Dr. Pratt reviewed the task list prepared by Ms. Umholtz and of the 30 tasks on the list, opined that claimant was unable to perform 12 for a 40 percent task loss. He reviewed the task list prepared by Mr. Dreiling and of the 13 tasks on the list, concluded that claimant was unable to perform 7 to 8 for a 54 to 62 percent task loss. He was of the opinion that claimant would be able to continue to work for respondent in the capacity set out in the memo of December 5, 2003. She would not, however, be able to use a scanning gun to scan tags on top shelves.

Dr. Ethan E. Bickelhaupt is board certified psychiatry and neurology with a subspecialty in geriatric psychiatry. He met with claimant on three occasions at the request of claimant's attorney. He first saw claimant on August 16, 2004. Upon psychiatric examination, he found claimant had a sad mood and affect as well as vegetative signs of depression. He diagnosed her with mood disorder with anxiety and depression secondary to her work injury, as well as a pain disorder in both hands, left greater than right, left arm, neck, and back of the head. He opined that she needed treatment from a psychiatric standpoint with particular focus on her depression, anxiety and sleep disorder.

Dr. Bickelhaupt saw claimant again on July 7, 2005. He again diagnosed her with a mood disorder with complicating anxiety and depression due to the work injury. She still suffered a pain disorder, which at that time included TMJ and oral dental pain. Using the 4th edition AMA *Guides*, Dr. Bickelhaupt determined that claimant had a class four, marked impairment with episodic exacerbation, to class five, extreme impairment with a related increase in anxiety or pain. The 4th edition of the AMA *Guides* does not assign actual numerical values to classifications of impairment in regard to psychiatry. Dr. Bickelhaupt was then asked to rate claimant using the 2nd edition of the AMA *Guides*. Doing so, he rated claimant as having a 75 percent impairment rating.

Dr. Bickelhaupt gave claimant permanent restrictions of not working in areas that involve computers or that required repetitive function. He believed that claimant's limitations were such that she would not safely be able to be gainfully employed at that time. He recommended ongoing medical management for pain and insomnia as well as additional psychotherapy.

Dr. Bickelhaupt testified that claimant related her TMJ to her pain. Her pain caused her to draw in her lower jaw with the lip pulling against her teeth, causing an imprint of her

teeth in her bottom lip. She was then given a mouth guard, which resulted in a broken bridge in her right lower jaw. That combination of factors, according to claimant, resulted in a malalignment of her temporomandibular joint.

Dr. Bickelhaupt saw claimant again on July 5, 2006. He found her psychiatric condition and pain disorder unchanged. Her diagnosis remained the same. He found nothing in this examination of claimant to change his opinions in regard to the appropriateness of her impairment rating or restrictions. Dr. Bickelhaupt testified:

> Within the context of the application of the psychiatric limitations and the limitations related to her pain symptoms and signs, there's not an area that immediately is available to her for which she could achieve gainful employment on an ongoing and long-term basis. Whether there would be other vocational areas that a specific counselor could discover with appropriate testing is not clear to me.[3]

Dr. Robert W. Barnett is a clinical psychologist who primarily does Social Security disability evaluations, workers compensation task loss analyses, and criminal defense work. Claimant's attorney requested he meet with claimant to give an opinion as to whether claimant suffered from a psychological disorder that would interfere with her doing sedentary to light work, specifically demonstrating products in a grocery store. He met with claimant on July 14, 2006. He reviewed claimant's medical records.

Dr. Barnett states he gives a mental status examination, a clinical review, reviews records and then selects specific tests. Dr. Barnett found claimant's affect during the interview indicated moderate dysphoria (sadness). She described herself as anxious and depressed, but he primarily saw dysphoria. He gave claimant a symptom inventory and administered a Minnesota Multiphasic Personality Inventory, second version (MMPI–2). Based on a review of claimant's records, the mental status exam, the clinical review, and the testing administered, Dr. Barnett found that claimant had dysthymic disorder (general sadness, symptoms of depression, historically associated with loss) secondary to chronic pain and reduced mobility of her neck. He also diagnosed claimant with anxiety disorder with panic episodes. He found these disorders to be directly or indirectly related to claimant's physical losses.

Dr. Barnett did not think claimant met the diagnostic criteria for a major depressive disorder. Although claimant complained of memory problems, he did not think memory was much of an issue.

[3] Bickelhaupt Depo. at 23.

In Dr. Barnett's opinion, claimant's ability to perform the job as demonstrator would be significantly impaired by her depression and anxiety. He believed the same would be true of other occupations. He did not believe she could work even on a part-time basis.

Dr. Patrick L. Hughes is a board certified psychiatrist. Claimant was initially referred to him by respondent's attorney for an independent psychiatric evaluation. He first saw her on November 4, 2004. He reviewed her records and conducted a psychiatric interview. At that time, Dr. Hughes opined that claimant suffered ongoing neuropathic/muscular pain that was a consequence of repetitive work activities. He did not believe she was at MMI with her organic pain and recommended referral to a pain management center. He also concluded that claimant did not report symptoms sufficient to represent a separate, medically diagnosable major depression or any other separate psychiatric condition warranting formal treatment by a psychiatrist. Dr. Hughes concluded that since claimant did not have a separate medically diagnosable psychiatric condition, she currently had 0 percent psychiatric disability or impairment. It was his opinion that her psychiatric symptoms would improve with better resolution of her chronic pain.

Dr. Hughes next saw claimant on September 13, 2005. After conducting a psychiatric interview, Dr. Hughes opined that claimant suffers from a pain disorder with medical features and psychological features. This was a change from his diagnosis of November 2004. He continued to recommend oral pharmacotherapy for her pain and medication for her psychiatric symptoms. He did not think she had reached MMI for treatment of her neuropathic pain or psychiatric symptoms.

Dr. Hughes disagreed with Dr. Bickelhaupt's diagnosis of mood disorder with anxiety and depression secondary to her work injury. He stated that research has proven that pain does not cause panic attacks, and there is no credible scientifically-sound research to support the theory that chronic pain causes clinical depression.

Dr. Hughes did not believe that claimant should be limited or restricted vocationally due to her psychiatric condition because not only were the intensity and consistency of her psychiatric symptoms short of that which usually necessitates people being off work, in her case actual reattainment of some employment would be helpful to her psychiatric state.

The claimant then received some treatment for her chronic pain which included psychiatric treatment with biofeedback for pain management as well as narcotic medication for her pain.

Dr. Hughes re-evaluated claimant a third time on June 6, 2006, and started treating her thereafter. He started her on Effexor, which regulates serotonin and possibly could also relieve her neuropathic pain. He also prescribed Xanax, an anti-anxiety medicine. Dr. Hughes has seen claimant five times after the June 6 evaluation, the last being on

September 26, 2006. She reported success with Effexor, was not having panic attacks, and was getting decent sleep. However, she did not report a decrease in her chronic pain levels as a result of using Effexor. Dr. Hughes felt that she was at MMI for psychiatric symptoms from her pain disorder and believes claimant will need to continue to take Effexor throughout her life.

Dr. Hughes opined that the psychiatric distress and symptoms that go along with claimant's chronic pain disorder are permanent. He judged that she had a permanent impairment in the mild category in the four classes in the AMA *Guides*. He stated that the AMA *Guides*, 4th edition, discourages arithmetical disability ratings and does not list any permanent partial disability numbers. In going back to the 2nd edition of the AMA *Guides*, Dr. Hughes rated claimant as having mild impairment levels in all four classes for a 10 percent permanent partial impairment of the body as a whole from psychiatric distress.

Dr. Hughes testified that claimant did not have any psychiatric restrictions from doing any work or need for accommodations or limits. He believed that psychiatrically, claimant would be able to perform in the job requiring her to price and demonstrate products.

Brenda Umholtz is a vocational rehabilitation counselor. At the request of respondent, she conducted a vocational assessment of claimant. She prepared a task list showing 30 tasks claimant performed in the 15-year-period before her injury.

Claimant graduated from high school and had about 24 hours of college but no degree. She worked only two jobs, one as a library assistant at a school and the other for respondent. Ms. Umholtz conducted an aptitude assessment and an office skills battery to determine claimant's level of clerical skills and office skills. Claimant's aptitude and strengths were in the area of communication. Ms. Umholtz opined that claimant would do well in occupations in business and service professional. She admitted that although claimant had the aptitude for these jobs, some would not be within her current physical restrictions. Some of those jobs would require retraining or some additional education. Claimant reported that she was in too much pain to complete the office skills test.

Ms. Umholtz also interviewed claimant in regard to wage loss and good faith effort to obtain employment. They discussed specifically the job of product demonstrations. Ms. Umholtz stated that the accommodated work offered to claimant on December 5, 2003, was within the restrictions of Drs. Galate and Delgado. Ms. Umholtz opined that respondent made reasonable accommodations to put claimant into a position she could perform.

Ms. Umholtz reported that claimant told her she had not looked for employment since February 2004. It was Ms. Umholtz's opinion that claimant did not make a good faith effort to return to work. Based upon claimant's education, experience, training, and restrictions, Ms. Umholtz opined claimant would be able to earn a wage of between $9.84 and $9.75 per

hour. She listed jobs that claimant would be able to perform within her restrictions: receptionist, teacher's aide, general office clerk, information clerk, furniture rental consultant, ticket agent, teller, and assistant librarian. She further stated that it was her opinion that claimant would be able to earn a comparable wage as she was earning with respondent.

Michael Dreiling, a vocational rehabilitation consultant, met with claimant on August 8, 2005, at the request of claimant's attorney to perform a vocational assessment. He generated a task list identifying 13 unduplicated tasks that claimant performed in the 15-year-period before her injury. He did not venture an opinion as to whether claimant was permanently, totally disabled from substantial gainful employment. He agreed respondent made an attempt to make some accommodations for claimant. Mr. Dreiling further agreed that claimant had made no effort to try to return to work with respondent since February 4, 2004. He agreed that based on respondent's accommodation, claimant has the ability to earn a comparable wage. He is aware claimant is on Social Security disability, and the standard is that an individual is not capable of performing substantial gainful employment in the open labor market.

Claimant stated that she still has panic attacks, inability to sleep, anxiety, dizziness, irritability and poor motivation. Claimant has not looked for work anywhere since she last worked for respondent. She does not feel capable of working and notes she has problems just dealing with her daily life.

Claimant argues that she is permanently and totally disabled as a result of her chronic pain syndrome and associated psychiatric pain disorder.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) , the statute provides that in all other cases permanent total disability shall be determined in accordance with the

facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[4]

In *Wardlow*[5], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

In this instance the claimant developed chronic pain syndrome as a result of the injuries she suffered performing repetitive work for the respondent. Various treatment modalities including acupuncture, psychotherapy, biofeedback and narcotic medication all failed to significantly alleviate claimant's chronic pain. She then developed psychiatric disorders and ultimately received treatment including medications which Dr. Hughes opined she will need to take for life. The claimant attempted the accommodated work that respondent provided but simply was unable to continue to perform those work activities due to pain. She told the store manager that she was having problems performing the accommodated work. And she was told the accommodated jobs were the easiest jobs that respondent had to offer.

There is no dispute that claimant has chronic pain. There is also no dispute that as a result of that condition the claimant developed a psychiatric condition described by Dr. Bickelhaupt as a mood disorder with complicating anxiety and depression, described by Dr. Barnett as a dysthymic disorder as well as anxiety disorder with panic episodes, and described by Dr. Hughes as a pain disorder with medical features and psychological features. The doctors all attributed claimant's psychological condition to her work-related injuries. Drs. Bickelhaupt and Barnett concluded that claimant was unable to achieve gainful employment on an ongoing, long-term basis.

Claimant stated that she is unable to work as a result of her chronic pain. She attempted to perform the accommodated work provided by respondent but was unable to continue because of her chronic pain. Although her physical restrictions would not prevent her from working, nonetheless, it is the chronic pain that prevents her from working. And

---

[4] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[5] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

there is no evidence to contradict the fact that claimant developed chronic pain syndrome as a result of her work-related injuries. Drs. Bickelhaupt and Barnett further note that she is unable to engage in gainful employment as a result of her psychiatric condition. The Board finds claimant has met her burden of proof to establish that she is permanently and totally disabled.

Respondent contends it is entitled to a credit under K.S.A. 44-510a. Claimant settled a workers compensation claim for a January 26, 1999 accident which resulted in bilateral carpal tunnel injuries. The claim was settled for a $10,000 lump sum. K.S.A. 44-510a(a) states, in pertinent part:

> If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. **Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if such compensation was settled by lump-sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate.** Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment. (Emphasis Added)

Simply stated, even assuming the claimant's prior disability contributed to the claimant's current permanent total disability, the payout for the July 26, 1999 injury was completed before the July 10, 2003 date of accident. Consequently, there would be no overlap of payments from the first award and the current award. Respondent's request for a credit pursuant to K.S.A. 44-510a is denied.

The respondent sent claimant for treatment with Dr. Hughes and he has recommended that claimant take the drug Effexor for her lifetime. Dr. Hughes further noted that claimant will need periodic medical examinations and monitoring as well as ongoing drug prescriptions. Dr. Hughes noted he would continue to monitor claimant every few months but that it would be appropriate, and less expensive, for a physician such as claimant's family physician, to provide the follow-up and to prescribe the medicine as long as no side effects intervene. Consequently, respondent is ordered to either continue to authorize Dr. Hughes

to monitor claimant or to designate a physician to monitor claimant's use of Effexor as suggested by Dr. Hughes.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated December 21, 2006, is modified to an award of permanent total disability and to award future medical treatment to monitor and prescribe claimant's lifetime use of Effexor or a like drug.

The claimant is entitled to permanent total disability compensation at the rate of $350.17 per week not to exceed $125,000 for a permanent total general body disability.

As of June 30, 2007, there would be due and owing to the claimant 207.29 weeks of permanent total disability compensation at the rate of $350.17 per week in the sum of $72,586.74 which is due and ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $52,413.26 shall be paid at $350.17 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of July 2007.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned Board Members agree that claimant has suffered a new injury which resulted in a permanent impairment and that she is in need of ongoing medical treatment, including psychiatric care. However, we respectfully disagree with the majority's determination that claimant has proven she is entitled to an award of permanent total disability.

In *Foulk*,[6] the Kansas Court of Appeals interpreted a prior version of K.S.A. 44-510e to require an injured worker seeking permanent disability benefits to make a good faith attempt to perform an accommodated job offered by her employer. In that case, the claimant's failure to do so resulted in the court imputing the wage which claimant would have earned had she accepted the employment. Applying the imputed wage to the disability formula in K.S.A. 44-510e resulted in a presumption of no work disability. Accordingly, claimant's permanent partial disability award was limited to her percentage of functional impairment. This same analysis has been applied to the current version of the general disability statute and has been expanded to not only require a claimant to attempt appropriate employment when it is offered but to also make a good faith search to find other employment post-injury whenever an accommodated job is not offered by the employer.[7]

In this case, respondent offered claimant an accommodated job that was within her restrictions and that she had the ability to perform. Claimant failed to make a good faith effort to perform that job. Accordingly, the wage claimant would have earned had she performed that job should be imputed to her. Because that job would have paid claimant "wages equal to 90% or more of the average gross weekly wage that the employee [claimant] was earning at the time of the injury,"[8] she is not entitled to receive a work disability (a permanent partial general disability in excess of her percentage of functional impairment). Likewise, because respondent offered claimant an accommodated job that she has the ability to perform, she is not incapable of engaging in substantial gainful employment. Therefore, claimant does not meet the definition of permanent total disability in K.S.A. 44-510c(a)(2).

---

[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[7] See, *e.g.*, *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001); *Swickard v. Meadowbrook Manor*, 26 Kan. App. 2d 144, 979 P.2d 1256 (1999); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999); *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

[8] K.S.A. 44-510e(a).

The undersigned Board Members would limit claimant's permanent disability award to her percentage of functional impairment that is attributable to this series of accidents.

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Timothy G. Lutz, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge